IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 349 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RATILAL CHOTUBHAI PATEL - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR PRAKASH K JANI for Appellant(s) : 1,
MR PD BHATE, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

Date : 26/12/2007

ORAL JUDGMENT

This appeal arises out of a judgment and order dated 3rd April 1997 rendered by the learned Additional Sessions Judge, Valsad in Sessions Case

No.53 of 1996.

2. The appellant was the original accused who was charged with offence punishable under section 302 of the Indian Penal Code. Learned Additional Sessions Judge, however, by his impugned judgment convicted the appellant under section 304 part II of the Indian Penal Code. He was sentenced to undergo rigorous imprisonment for five years and pay fine of Rs.500. The appellant is therefore in appeal before this Court.

3. Prosecution case was that on 8th December 1995 between 8.00 and 8.30 in the morning, the appellant was in his agricultural field situated in the sim of village Balvada. Deceased Dhirubhai who was the brother of the appellant was also present there since he also had agricultural land adjoining the land of the appellant. Two brothers had a quarrel about operating the electric motor fitted on the well. The appellant, therefore, hit the deceased on his head with the blunt portion of an axe. He also gave several blows to the deceased on his back. The deceased was then carried to hospital, initially at Chikly. He was, thereafter, shifted to Gohil hospital at Navsari. However on 14.12.95, he died due to the injuries caused to him by the appellant.

4. The prosecution examined several witnesses including doctors who had treated the deceased and

who had performed post-mortem. PW-1, Dineshbhai Govindbhai, Ex.12 is the brother-in-law of the accused as well as the deceased. He had lodged the complaint before the police. In his deposition, he stated that on the date of the incident i.e. 8th December 1995, he was at Chikli. At 9.20 in the morning, wife of deceased Niruben brought the deceased in a tempo. She was accompanied by Laxmiben, sister of the deceased. He stated that the deceased was bleeding from the head and there was swelling on his stomach. He took the patient to Chikli referral hospital where he was treated. They were then advised to take him to Navsari Gohil hospital. The deceased was, therefore, admitted in Gohil at Navsari after which the witness went to Navsari Town Police Station to lodge the complaint. He was told by the wife of the deceased that the deceased had a quarrel about operating the motor.

In the cross-examination, he admitted that he had not given the full details of the incident in his complaint before the police. He, however, stated that he had disclosed to the police that the deceased and the accused had a physical fight.

5. Wife of the deceased, Niruben, PW-10, was examined at Ex.27. She stated that on 8th December 1995, her husband had left at 8 O' clock in the morning for going to the field to water the crop. After some time, one Ramanbhai from her village came to her house and told her that her husband was beaten

up by the accused and is lying near the well in the field. Ramanbhai took her sister-in-law on the motor-cycle. She herself started running towards the field. On the way, she met Ramanbhai and her sister-in-law who was bringing her husband along with them. She found that her husband was bleeding. He had got injuries on the head and on the back. Her husband was taken to Chikli in a tempo and on the way, her husband told her that the accused has beaten him with an axe. From Chikli, he was taken to Navsari Gohil hospital where during treatment he died. She stated that her husband had a fight with the accused about operating the motor on the well. She stated that earlier also, they had a fight with the accused regarding agricultural land and the accused had beaten him about two years back, about which a complaint was also lodged.

In the cross-examination, she admitted that before the police, she had not disclosed that in the tempo her husband had spoken to her about the incident. She admitted that till her husband expired, he had not regained consciousness.

6. Lekhiben, PW-2, was examined at Ex.13. According to her, she had seen the incident. In her deposition, she stated that she knew the accused as well as the deceased. Her house is situated at a distance of 2 to 3 furlong from the house of the deceased and accused. She stated that the incident took place between 8.00 and 9.00 in the morning of

8th December 1995. At that time, she had gone to the well of the deceased. Since both the deceased and the accused were serving, she was asked to cultivate their lands. She had gone to start the motor fitted on the well. The deceased had pressed the button and started the motor. Soon thereafter. Accused came and put the motor off. The two, therefore, had a heated exchange of words, upon which the accused gave a blow to the deceased with an axe which he was carrying and the deceased fell down. After which also, the accused gave more blows on the head as well as on the back. Blows were given from the back portion of the axe. Since she was very scared, she went away from them. She identified the axe as one used in the offence.

In her cross-examination, she stated that after the incident, she did not disclose the facts to anyone. Two or four blows were given on the head with force. The deceased started bleeding and there was blood on the ground also. After the first blow on the head, the deceased fell down on the ground with his face towards the ground. Two to three blows were given on the back with force. On account of the blows, the deceased could not speak. Her house was only 2 to 3 minutes walking distance from the house of the deceased. Her husband was at home when she reached there. She did not inform the family members of the deceased since her mind had got numbed. She, however, had spoken to her husband about the incident.

7. PW-7, Dr.Dhananjay was examined at Ex.19. He was the medical officer at Navsari Civil hospital. He has carried out the post-mortem on the body of the deceased on 14.12.95. He found scratch marks on the right eye of the deceased. One scratch mark was found on the forehead and one on the nose. In addition thereto, he also found one stitched wound on the left side of the head where the surrounding area was swollen. He found an old mark of operation on the stomach and swelling on the spinal code. Operation mark on the stomach was an old injury. Rest were ante-mortem injuries according to the doctor. Upon post-mortem, he found that there was swelling on the occipital region of the head and there was swelling on the brain where blood had also clotted. He found that there was blood in the lungs and there was clotting in the heart. There was internal bleeding in the back. Both kidneys were damaged and there was bleeding in the kidneys also. There was a fracture in the spinal code. In his opinion, death occurred on account of the injuries to the kidneys. He stated that the injury on the spinal code could have been caused by the back portion of an axe.

8. Dr.Vasant Kapadia, PW-8, Ex.21 had produced papers of the medical treatment given to the deceased at Gohil Hospital at Navsari.

9. Dr.Ramchandra Patil, PW-9, Ex.25 was the

medical officer at Chikli referral hospital at the relevant time. He had treated the deceased on 8th December 1995. According to his deposition, the deceased was brought to the hospital at 9.45 in the morning of 8th December 1995. He had noticed injuries to the deceased on the head, on the spinal code, on the neck and on the nose. He had stitched wound on the head. He found that the injuries were serious. He, therefore, referred the patient to Navsari. He opined that the injuries to the spinal code could have been caused by the back portion of an axe. Significantly, he stated that the patient was unconscious when he was brought to the hospital.

10. Though according to the prosecution, weapon used in the offence, namely, axe was recovered at the instance of the accused, panch witnesses had turned hostile and the recovery was also not proved through the evidenced of the Investigating Officer.

11. In nutshell, above is the evidence led by the prosecution to prove the charge against the appellant, original-accused.

12. At the outset, it may be noted that though Niruben, PW-10, in her deposition stated that her husband while being taken to the hospital in a tempo had disclosed to her that he was beaten up by the appellant with an axe, there appears to be serious doubt about the veracity of such disclosure. Lekhiben, PW-2, in her deposition stated that on

account of the blows received by the deceased, he could not speak. Dr.Patil, PW-9, stated that when the deceased was brought to his hospital at 9.45 a.m. on 8th December 1995, he was unconscious. Witness Niruben herself did not disclose this important aspect to the police when her statement was recorded. This, therefore, is a certain improvement sought to be made by the witness to strengthen the prosecution version. This so called disclosure by the deceased to witness Niruben, therefore, needs to be discarded from the consideration at the very outset.

13. PW-1, Dineshbhai, was the person who had lodged the complaint before the Police. He himself was not an eye-witness. He was at Chikli on 8th December 1995 when the deceased was brought by his wife and others in a tempo. Dineshbhai had taken the deceased to the hospital at Chikli for treatment. Though submissions were made to suggest that Dineshbhai had not given full details of the incident in his complaint, it cannot, however, be denied that in the complaint, Dineshbhai did mention that the deceased had a fight with the accused and that he was assaulted by the accused. It is by now well settled that the complaint need not give elaborate details about the incident. In the present case, however, one finds that the basic essential facts were indicated in the complaint.

14. The entire prosecution case hinges on the

sole eye witness account of Lekhiben, PW-2, Ex.13. Her deposition, therefore, needs careful scrutiny.

15. As noted, Lekhiben claims to be present when the incident took place. She stated that the deceased and the accused had a fight about operating the motor on the well. After some heated exchange, accused gave a blow to the deceased with an axe. Deceased thereupon fell down on the ground. Accused, however, continued to give blows on the head and on the back. Blows were given from the back portion of the axe,

16. From her deposition, following things clearly emerge :

(1)She was cultivating the fields of the brothers since both the brothers were serving.
(2)She had gone to the well where both, deceased and accused were present. Her presence at the scene of offence was thus natural.
(3)She saw that first the deceased started the motor. Soon thereafter, the accused came and put the motor off. This led to a quarrel between the two.
(4)Accused, therefore, gave blows to the deceased with an axe which he was carrying.

In the cross-examination, no suggestion has been put regarding the witness having any interest in falsely implicating the accused. Her statement that both, the

deceased and the accused were serving and that therefore, she was cultivating their land was not challenged. Though learned advocate Shri Jani for the appellant submitted that this witness was cultivating the land of the deceased and that therefore, she had favoured the prosecution against the appellant, there is nothing on record to lay a factual foundation for this averment. As noted, Lekhiben stated that both, the deceased and the accused were serving and therefore she was asked to cultivate their lands. Both these aspects, namely, that the deceased and the accused were serving and that the witness was cultivating the land were not challenged in the cross-examination. The suggestion that Lekhiben, therefore, gave false evidence to favour the family of the deceased cannot be accepted.

Additionally, I also find that the evidence of eye-witness Lekhiben is substantially corroborated by the medical evidence. As per Lekhiben, accused gave blows to the deceased on his head as well as on back with the blunt portion of the axe which he was carrying. Corresponding injuries were also noticed by Dr.Patil, PW-9 who had treated the deceased as well as by Dr.Dhananjay, PW-7, who had carried out the post-mortem of the deceased.

17. It is true that this witness Lekhiben did not disclose the incident to any one till the statement was recorded by the police two days after the incident. She, however, stated that she did speak

to her husband on reaching her home. She did not, however, go to the house of the deceased to inform his family members since her mind had gone completely numb.

The suggestion of the learned counsel for the appellant that the conduct of the witness was unnatural inasmuch as she did not intervene between two warring brothers cannot be accepted. The appellant was giving blows to the deceased with considerable force. He was carrying an axe. If Lekhiben did not intervene, her conduct cannot be stated as unnatural. Her testimony need not, only on this ground, be discarded.

Insofar as evidence of PW-2, Lekhiben, is concerned, I find that her testimony is reliable. Her presence, as noted, is natural. Defence also put no suggestion that she had any enmity with the appellant or any reason to falsely implicate him. Description of the assault receives considerable support in the form of medical evidence also. Considering all these aspects of the matter, I find that the prosecution case stand proved, even if there was only one eye-witness to the incident.

18. Learned advocate Shri Jani for the appellant, however, relied on certain authorities which need to be discussed.

18.1 In the case of **State of Bihar v. Kali Das**

Manjhi, 2001 Cri.L.J. 1103, a Division Bench of the Patna High Court was pleased to acquit the accused finding that the testimony of the sole eye-witness was not reliable. It was held that the same was inconsistent with the complaint which itself was lodged after five days of the occurrence of the incident. The Court also found that the conduct of the eye-witness in not disclosing the occurrence to anybody would create doubt about the veracity of his testimony.

18.2 In the case of **Jaysing v. State of Maharashtra,** 1999 Cri. L.J. 1687, a Division Bench of the Bombay High Court, discarded the evidence of eye-witness finding that in the said case, no test identification parade was carried out. The Court found that such test was imperative. Incidentally, it was also found that the witness had not disclosed seeing of the incident to anybody till next day. In the case on hand, PW-2, Lekhiben knew both the deceased as well as the accused long before the incident. Identification of the accused, therefore, was not an issue at all.

18.3 In the case of **Joseph v. State of Kerala**, 2003 Cri. L.J. 2543, the Appex Court finding that the circumstances establish that the eye-witness had not witnessed the occurrence, found it unsafe to base conviction on the sole eye-witness account. In the said case, it was found that the witness claimed to have seen the incident when he was proceeding towards

his house. It was found that there was no electric light available and the candle light or kerosene lamp burning in the house of eye-witness would not be sufficient to facilitate identification. In the case on hand, the incident occurred in broad day light and the witness had an occasion to see the incident from a very close quarter.

18.4. In the case of **Badam Singh v. State of Madhya Pradesh**, AIR 2004 SC 26, the Apex Court found that there was no motive for the appellant to kill the deceased. It was observed that though existence of motive loses significance when there is reliable ocular testimony, in a case where the ocular testimony appears to be suspect the existence or absence of motive acquires some significance regarding the probability of the prosecution case. In the said case, the Apex Court found that the deceased was a history sheeter and he was involved in large number of criminal offences including dacoity, robbery, abduction, kidnapping and attempt to murder. Possibility of his having been killed by one of his enemies could not be ruled out. In the case on hand, there is no such background. In fact, there was, if at all, the background of some bad blood between the accused and the deceased and there apparently was a quarrel between two on the date of the incident itself.

18.5 In the case of **Kochu Maitheen Kannu Salim v. State of Kerala,** AIR 1998 SC 2852, the Apex Court

found that eye-witness account was unreliable since the conduct of the eye-witness in not informing anybody till next evening was found to be inconsistent with the act of accompanying the deceased. The Apex Court found that the eye-witness seeing the incident was highly doubtful. It was also found that time of recording of FIR was also doubtful. Considering all these aspects of the matter, the Apex Court was pleased to acquit the accused.

19. In view of the above discussion, I do not find that the learned Additional Sessions Judge committed any error in convicting the appellant of offence punishable under section 304 part II of the Indian Penal Code. Since there was a sudden quarrel between the accused and the deceased, the learned Judge sentenced the appellant to 5 years of rigourous imprisonment which is also reasonable. Significantly, the appellant at the time of the incident was aged about 40 years. He was thus not a man of tender age or of immature nature. He had given blows to his brother with considerable force on vital parts of the body. Further reduction in his sentence would therefore be unjust.

20. In the result, the appeal fails and is hereby dismissed. Bail stands cancelled. The appellant shall, however, have time upto 15th February 2008 to surrender.

(Akil Kureshi, J.)

(vjn)